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**"PARTNERSHIP BUSTER"\* IN THE FEDERAL  
GOVERNMENT: THE RELATIONSHIP BETWEEN 5  
U.S.C. § 7106(a) AND (b)(1)**

**JAMES J. POWERS\*\***

**INTRODUCTION**

Federal agencies and labor unions have long operated under collective bargaining laws that differ from private sector labor laws.<sup>1</sup> Title VII of the Civil Service Reform Act ("CSRA") of 1978, also known as the Federal Service Labor-Management Relations Statute ("FSLMRS"), outlines the rights and duties of both agencies and unions in the federal government.<sup>2</sup> A distinction exists in federal sector labor relations between mandatory, prohibited, and permissive subjects of bargaining. The FSLMRS requires federal agencies to negotiate mandatory subjects with unions. These mandatory subjects

\* FLRA, OFFICE OF THE GENERAL COUNSEL, ADVICE MEMORANDUM NO. 95-3, at 3 (Feb. 28, 1995), *reprinted in* FLRA, PUB. NO. 95-2, FLRA NEWS (1995) [hereinafter FLRA ADVICE] (using the term "partnership buster" to describe the uncertainty over the relationship between 5 U.S.C. § 7106(a) and (b)(1)).

\*\* J.D. Candidate, Chicago-Kent College of Law, 1998. I wish to thank Professor Marty Malin for his insight and guidance on the development of this Note. I also wish to thank my father for his encouragement and support. His thirty-year dedication to federal service prompted my own interest in the issues affecting federal government "bureaucrats."

1. While as early as 1912 Congress recognized the right of federal employees to participate in organizations striving to improve working conditions, *see* Lloyd-LaFollette Act, ch. 389, § 6, 37 Stat. 555 (1912), an official labor-management relations program for federal employees was not established until 1962 with an Executive Order by President John Kennedy. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963) (revoked by Exec. Order No. 11,491, 3 C.F.R. 191 (1969), *reprinted as amended in* 5 U.S.C. § 7101, at 1028 (1994)); *see also* GAO, GGD-91-101, FEDERAL LABOR RELATIONS A PROGRAM IN NEED OF REFORM 10 (1991). Congress began regulating private sector labor relations as early as 1926 with the passage of the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1994)). In 1935, the National Labor Relations Act provided the legal basis for collective bargaining for most private sector employees. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)). However, federal, state, and local governments, as well as agricultural workers, supervisors, and employees covered by the Railway Labor Act were exempted from coverage. *See* 29 U.S.C. § 152(2)-(3).

2. 5 U.S.C. §§ 7101-7135 (1994). However, certain agencies in the federal government operate under still different laws. For example, private sector labor laws apply to exclusive representatives of postal employees. *See* 39 U.S.C. §§ 1201-1209 (1994). In addition, the FSLMRS specifically excludes the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, Tennessee Valley Authority, the Federal Labor Relations Authority, the Federal Service Impasses Panel, and the Central Imagery Office. *See* 5 U.S.C. § 7103(a)(3). The President, through Executive Orders, can also exclude other agencies or subdivisions of agencies whose primary function involves intelligence gathering or national security work. *See* 5 U.S.C. § 7103(b)(1)(A).

include general "conditions of employment."<sup>3</sup> The FSLMRS specifically enumerates two categories of mandatory subjects: (1) procedures which an agency observes in exercising its authority<sup>4</sup> and (2) appropriate arrangements for employees adversely affected by management's exercise of authority.<sup>5</sup> The FSLMRS prohibits federal agencies and unions from negotiating subjects enumerated in 5 U.S.C. § 7106(a). These prohibited subjects include an agency's budget, mission, internal security practices, personnel selections, assignment of work, use of contract workers, and actions during emergencies.<sup>6</sup> In addition, the FSLMRS permits agencies, at their election, to negotiate permissive subjects of bargaining enumerated in § 7106(b)(1). These permissive subjects include the methods and means of performing work and the number of employees assigned to an organizational subdivision.<sup>7</sup> However, unions have no recourse if agencies decline to negotiate these § 7106(b)(1) permissive subjects.

In October 1993, President Bill Clinton effectively abolished the category of permissive subjects of bargaining in the federal sector. Executive Order 12871 directed agency heads to negotiate § 7106(b)(1) subjects with their respective unions in new labor-management partnership committees.<sup>8</sup>

Although the Executive Order forced agencies to negotiate § 7106(b)(1) subjects, agencies were provided little guidance on the proper limits between these new "mandatory" subjects and the still prohibited subjects of bargaining enumerated in § 7106(a). The Federal Labor Relations Authority ("FLRA"), the federal agency entrusted with overseeing federal labor-management relations,<sup>9</sup> had encountered few opportunities prior to Executive Order 12871 to rule on the proper relationship between § 7106(a) and (b)(1).<sup>10</sup> In most cases prior to Executive Order 12871, an agency always could rely on

3. The FSLMRS grants federal employees the right to "engage in collective bargaining with respect to conditions of employment through representatives." 5 U.S.C. § 7102(2). "Conditions of employment" generally include personnel policies and practices affecting working conditions. 5 U.S.C. § 7103(a)(14).

4. See 5 U.S.C. § 7106(b)(2).

5. See 5 U.S.C. § 7106(b)(3).

6. See 5 U.S.C. § 7106(a).

7. See 5 U.S.C. § 7106(b)(1).

8. See Exec. Order No. 12,871, 3 C.F.R. 655, 657 (1994) [hereinafter Order 12,871], reprinted in 5 U.S.C. § 7101 at 1033, 1034.

9. The FLRA replaced the Federal Labor Relations Council, see *infra* note 50, as an independent body responsible for enforcing the provisions of the FSLMRS. See 5 U.S.C. §§ 7104-7105 for a description of the structure and duties of the FLRA.

10. See BARRY E. SHAPIRO & CHRISTOPHER EVANS, *FEDERAL LABOR RELATIONS 1995 DESK BOOK* at I-8 (1994).

its discretion not to negotiate a § 7106(b)(1) permissive subject of bargaining instead of arguing that the subject also infringed on a § 7106(a) reserved right.<sup>11</sup>

In 1994, the U. S. Court of Appeals for the District of Columbia Circuit limited the scope of § 7106(a) reserved rights by holding that § 7106(b)(1) permissive subjects of bargaining are negotiable, despite any infringement on § 7106(a) reserved rights. In *Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*,<sup>12</sup> ("ACT"), the court barred an agency head from subsequently refusing to approve an already negotiated § 7106(b)(1) subject regardless of its conflict with a § 7106(a) reserved right.<sup>13</sup> According to the court, Congress intended to make § 7106(b)(1) subjects exceptions to § 7106(a) reserved rights.<sup>14</sup> The FLRA subsequently adopted the court's interpretation of the relationship between § 7106(a) and (b)(1).<sup>15</sup>

This Note will analyze the FSLMRS to determine the proper relationship between prohibited and permissive subjects of bargaining found in the federal sector. Part I will describe the differences between private and federal sector labor relations, the legislative history of the FSLMRS, and case law interpreting the proper relationship between § 7106(a) and (b). Part II will describe Executive Order 12871 and its impact on future agency-union negotiations concerning § 7106(b)(1) subjects. Part III will present the decision of the ACT court on the relationship between § 7106(a) and (b)(1). Part IV will evaluate the court's reasoning in light of the legislative history of the FSLMRS and prior case law. Finally, Part V will suggest a proper relationship between § 7106(a) and (b)(1).

## I. INTRODUCTION TO THE FSLMRS

### A. Federal Versus Private Sector Labor Relations

Although the FSLMRS contains some similarities to private sector labor laws,<sup>16</sup> federal sector unions possess vastly inferior bargain-

11. See *infra* note 143 and accompanying text.

12. 22 F.3d 1150 (D.C. Cir. 1994).

13. See *id.* at 1155-56.

14. See *id.*

15. See National Ass'n Gov't Employees, Local R5-184, 51 F.L.R.A. 386, 392 (1995).

16. See GAO, *supra* note 1, at 14. The FSLMRS provided for the creation of the FLRA, an independent agency to issue policy decisions and adjudicate labor disputes in the federal sector, similar to the National Labor Relations Board (NLRB). Compare 5 U.S.C. § 7104(a)-(b) (establishing a three-member board appointed by the President) with 29 U.S.C. § 153(a) (establishing a five-member board appointed by the President). The FLRA, like the NLRB, also has a General Counsel who is entrusted with the investigation of unfair labor practice charges and the prosecu-

ing power when compared to their private sector counterparts. Since the passage of the National Labor Relations Act,<sup>17</sup> private sector unions have enjoyed the power to require an employer to negotiate a broad range of subjects. In the private sector, management and unions must bargain in good faith on "wages, hours, and other terms and conditions of employment."<sup>18</sup> Based on the preceding directive, subjects of negotiation can be divided into three categories: mandatory, permissive, and prohibited. Mandatory subjects of bargaining in the private sector normally include "layoffs and recalls, sick leave, incentive pay, paid holidays, vacation schedules, hours of work, work rules relating to shifts of work and such fringe benefits as cost-of-living adjustments and profit-sharing plans."<sup>19</sup>

An employer's obligation to bargain is limited by only those subjects designated by the courts as permissive or by Congress as illegal. A party is not obligated to bargain over permissive subjects but may choose to do so.<sup>20</sup> A party commits an unfair labor practice if it insists on a permissive subject of bargaining to the point of impasse.<sup>21</sup> A mandatory subject of bargaining must have a "'direct, significant relationship to . . . terms or conditions of employment,' rather than a 'remote or incidental relationship.'"<sup>22</sup> Courts generally have defined "terms and conditions of employment" broadly so that few subjects

tion of complaints. Compare 5 U.S.C. § 7104(f)(2)(B) (establishing a General Counsel), with 29 U.S.C. § 153(d) (establishing a General Counsel).

The method for resolving unfair labor charges was intended to be analogous to the private sector as well. See H.R. REP. NO. 95-1403, at 50 (1978), reprinted in SUBCOMM. ON POSTAL PERSONNEL AND MODERNIZATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 675, 696 (Comm. Print 1979) [hereinafter LEGISLATIVE HISTORY]. Compare 5 U.S.C. §§ 7116, 7118 (outlining unfair labor practices for both a union and agency and the General Counsel's review of unfair labor practice complaints), with 29 U.S.C. §§ 158, 160 (outlining unfair labor practices by both an employer and union and the responsibilities of the General Counsel to prevent unfair labor practices).

17. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

18. 29 U.S.C. § 158(d).

19. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 107 (3d ed. 1993) (footnote omitted); see, e.g., NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954) (per curiam) (affirming profit-sharing plans are mandatory subjects); *Medicenter, Mid-South Hosp.*, 221 NLRB Dec. (CCH) 670 (1975) (holding the adoption of mandatory polygraph examinations is a mandatory subject); *Standard Candy Co.*, 147 NLRB Dec. (CCH) 1070 (1964) (holding changes in wage scales are mandatory subjects); *In re National Grinding Wheel Co.*, 75 NLRB Dec. (CCH) 905 (1948) (holding that elimination of rest and lunch periods is a mandatory subject).

20. See GOULD, *supra* note 19, at 106.

21. See *id.*

22. NLRB v. Salvation Army of Mass. Dorchester Day Care Center, 763 F.2d 1, 7 (1st Cir. 1985) (quoting NLRB v. Massachusetts Nurses Ass'n, 557 F.2d 894, 898 (1st Cir. 1977)), quoted in GOULD, *supra* note 19, at 107.

are declared permissive.<sup>23</sup> Management and unions are also restricted from bargaining illegal subjects such as discriminatory practices based on race, religion, and gender,<sup>24</sup> hot cargo clauses,<sup>25</sup> and closed shops.<sup>26</sup>

In the federal sector, the range of mandatory subjects of collective bargaining is much more limited than in the private sector. Federal sector prohibited and permissive subjects outnumber private sector prohibited and permissive subjects of bargaining. Although federal sector unions enjoy the right to bargain about "conditions of employment,"<sup>27</sup> the FSLMRS includes several exceptions that severely restrict the range of negotiable subjects.<sup>28</sup>

First, even if a union proposal concerns a condition of employment, a federal agency is prohibited from negotiating with the union if bargaining in good faith is "inconsistent with any Federal law or any Government-wide rule or regulation."<sup>29</sup> Beyond this consistency requirement, a union still may not automatically bargain over subjects of agency rules and regulations unless the FLRA has found that "no compelling need . . . exists for the rule or regulation."<sup>30</sup> Second, the FSLMRS reserves a list of enumerated rights that federal agencies may not bargain away to unions. This list includes an agency's mission, budget, and personnel selections.<sup>31</sup> Third, the FSLMRS outlines

23. However, courts have had difficulty differentiating between mandatory and permissive subjects of bargaining. See GOULD, *supra* note 19, at 110-15; cf. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981) (ceasing business operations is a permissive subject of bargaining); *Fiberboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (contracting out work formerly performed by employees is a mandatory subject of bargaining); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958) (proposing procedures regulating internal union votes is a permissive subject).

24. See 42 U.S.C. § 2000e-2(c) (1994).

25. Hot cargo clauses exempt employees from handling goods bound for an employer that is blacklisted by a union. The employer, in effect, agrees not to do business with another employer that the union targets. See GOULD, *supra* note 19, at 52. Such clauses are void and unenforceable with certain exceptions for the construction and garment industries. See 29 U.S.C. § 158(e).

26. A closed shop agreement requires an employer to only hire union members and discharge those employees who lose union membership. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *CASES AND MATERIALS ON EMPLOYMENT LAW* 50 (3d ed. 1994). Closed shops are now illegal because an employer must allow an employee a thirty-day grace period before requiring the payment of union dues. See 29 U.S.C. § 158(a)(3), (b)(2).

27. 5 U.S.C. § 7102(2). "'Conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." 5 U.S.C. § 7103(a)(14).

28. See *Department of Defense v. FLRA*, 685 F.2d 641, 644 (D.C. Cir. 1982).

29. 5 U.S.C. § 7117(a)(1).

30. 5 U.S.C. § 7117(a)(2).

31. Section 7106(a) states in part:

Nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

a separate category of subjects that federal agencies may negotiate at their discretion.<sup>32</sup> These permissive subjects include "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or . . . the technology, methods, and means of performing work."<sup>33</sup>

The only clearly defined subjects that federal agencies and unions must negotiate are the "procedures which management . . . will observe in exercising any authority under this section"<sup>34</sup> and "appropriate arrangements for employees adversely affected by the exercise of any authority under this section."<sup>35</sup> However, even these two mandatory subjects must pass the consistency and compelling need tests for compliance with existing federal laws and regulations.<sup>36</sup>

The comparatively weak bargaining position of federal sector unions is highlighted by their inability to call for strikes and work actions.<sup>37</sup> Although Congress has long protected the right to withhold labor for private sector employees,<sup>38</sup> Congress has also recognized the

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

5 U.S.C. § 7106(a).

32. See 5 U.S.C. § 7106(b)(1).

33. *Id.*

34. 5 U.S.C. § 7106(b)(2).

35. 5 U.S.C. § 7106(b)(3).

36. "Section 7106(b)(3) does not make negotiable a matter which is inconsistent with law other than the Statute." American Fed'n of Gov't Employees, Dep't of Educ. Council of AFGE Locals, 38 F.L.R.A. 1068, 1083 (1990).

37. Cf. GAO, *supra* note 1, at 14 (citing the prohibition of traditional bargaining incentives like strikes as a major difference between labor relations in the federal and private sector); GOULD, *supra* note 19, at 179 ("The most difficult public-sector issue in the United States relates to whether public employees should have the right to strike."); SAR A. LEVITAN & ALEXANDRA B. NODEN, *WORKING FOR THE SOVEREIGN: EMPLOYEE RELATIONS IN THE FEDERAL GOVERNMENT* 41-42 (1983) (analyzing traditional arguments against federal employees' right to strike); MICHAEL YATES, *LABOR LAW HANDBOOK* 48 (1987) (describing the serious penalties that face federal employees who strike).

38. In 1914, Congress denied employers the use of the federal court system to prevent union work stoppages. The Clayton Act generally prevented federal courts from issuing injunctions in labor disputes "concerning terms or conditions of employment." Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. § 52).

inconsistency between work stoppages and an effective public sector.<sup>39</sup> The FSLMRS precludes strikes as an option for federal unions to use against management,<sup>40</sup> and Congress even has provided criminal penalties for those federal employees found guilty of striking.<sup>41</sup>

In addition to their inability to strike, federal sector unions may not bargain for union or agency shops.<sup>42</sup> The FSLMRS guarantees federal employees the right to "refrain from [joining a labor organization], freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."<sup>43</sup>

### B. Legislative History of the FSLMRS

"Bureaucrats. If you're not one of them, you probably can't stand them. You figure that they're lazy and overpaid, that they arrive at work late, leave early and take long lunch hours. But you can't do anything about it, because it's impossible to fire a bureaucrat."<sup>44</sup> This common viewpoint provided the backdrop for civil service reform in 1978.<sup>45</sup> President Jimmy Carter proposed legislation in 1978 with the

39. The most common arguments against public sector strikes include the protection of public safety, state sovereignty, and democratic processes. See LEVITAN & NODEN, *supra* note 37, at 41-42.

40. The FSLMRS specifies that it is an unfair labor practice for a union to "call, or participate in, a strike, work stoppage, or slowdown." 5 U.S.C. § 7116(b)(7)(A). In addition, a union commits an unfair labor practice by "failing to take action to prevent or stop such activity." 5 U.S.C. § 7116(b)(7)(B). Although a striking union is, by definition, not a labor organization, see 5 U.S.C. § 7103(a)(4)(D), the FLRA has discretion to either revoke the exclusive recognition status of a striking union or "take any other appropriate disciplinary action." 5 U.S.C. § 7120(f)(1)-(2); see *Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 578-84 (D.C. Cir. 1982).

41. 18 U.S.C. § 1918 (1994) (providing for up to a \$1,000 fine and a year imprisonment).

42. Union shops (workplaces where employees are required to become a member of the union after the 30-day grace period by paying union membership dues, see ROTHSTEIN & LIEBMAN, *supra* note 26, at 51) are allowed in private industry except in those states with "right to work" statutes. See 29 U.S.C. § 164(b). Agency shops are workplaces where union membership is not required, but all employees are required to pay fees comparable to union dues for purposes of union administration and contract negotiation. See ROTHSTEIN & LIEBMAN, *supra* note 26, at 51.

43. 5 U.S.C. § 7102. For arguments against the prohibition of the union shop in the federal government, see LEVITAN & NODEN, *supra* note 37, at 16-18 (attributing lagging union membership in the federal government to the preclusion of union shop agreements); Marick F. Masters & Robert S. Atkin, *Financial and Bargaining Implications of Free Riding in the Federal Sector*, 22 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 327, 332 (1993) (changing policies to encourage union membership might significantly increase the unions' capacity to bargain).

44. *Bureaucrats Under Fire*, 10 NAT'L J. Sep. 30, 1978, at 1540.

45. See *Bureaucrats on Notice: Shape Up or Else!*, U.S. NEWS & WORLD REP., Oct. 23, 1978, at 36 (quoting President Carter's view that the American people view bureaucrats as "underworked, overpaid"); Robert R. Dince, *Coping with the Civil Service*, FORTUNE, June 5, 1978, at 132 (describing personal frustrations with civil service system). However, in a bid to gain public support for civil service reform, President Carter himself partly contributed to the public's low esteem of federal workers by stressing stereotypical bureaucratic inefficiency. See, e.g., Patricia W. Ingraham, *The Civil Service Reform Act of 1978: The Design and Legislative History*, in



intent to "increase the government's efficiency by placing new emphasis on the quality of performance of Federal workers."<sup>46</sup> President Carter initially did not emphasize revamping the federal government's labor-management relations system. Rather, President Carter stressed abolishing the U.S. Civil Service Commission, establishing a Senior Executive Service, providing incentive pay for federal managers, and easing the restrictions on discharging federal employees.<sup>47</sup> However, as the civil service reform bills progressed through Congress, the Carter Administration soon found it necessary to include labor relations reform as a way to placate strong opposition from organized labor and other employee interest groups.<sup>48</sup>

To a large extent, President Carter's proposal merely would have codified the language of Executive Order 11491.<sup>49</sup> Executive Order 11491, as interpreted by the Federal Labor Relations Council,<sup>50</sup> provided for mandatory, permissive, and prohibited subjects of bargaining like the private sector. Mandatory subjects of bargaining included "personnel policies and practices and matters affecting working conditions."<sup>51</sup> Mandatory subjects consisted of the alleviation of adverse impacts on employees and procedures concerning the exercise of management's rights.<sup>52</sup> However, like the FSLMRS, management retained many rights on which it was either prohibited to negotiate or permitted to negotiate at its discretion. Prohibited subjects included an agency's right to direct, hire, promote, and discharge employees; to maintain efficient operations; and to determine methods and means

LEGISLATING BUREAUCRATIC CHANGE 13, 21 (Patricia W. Ingraham & Carolyn Ban eds., State Univ. of New York Press 1984).

46. See H.R. DOC. NO. 95-299, at 1 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 623.

47. See *id.* at 2-3, *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 624-25.

48. See Ingraham, *supra* note 45, at 20.

49. See, e.g., H.R. REP. NO. 95-1403, at 12 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 682 (acknowledging Carter's proposal would have merely codified the Executive Order labor relations system); 124 CONG. REC. 25,613 (1978) (statement by Rep. Clay); *id.* at 13,733 (reprinting letter from Civil Service Chairman, Alan K. Campbell).

50. Executive Order 11491 established the Federal Labor Relations Council to administer and interpret the Executive Order labor relations system. Exec. Order No. 11491, 3 C.F.R. 191, 194 (1969) [hereinafter Order 11,491], *reprinted as amended in* 5 U.S.C. § 7101, at 1029 (1978). The Council was composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and another Executive Branch official. See *id.* at 194, *reprinted as amended in* 5 U.S.C. § 7101 app. at 1029. However, Order 11491 did not provide for judicial review of the Council's decisions.

51. Order 11,491, *supra* note 50, at 198, *reprinted as amended in* 5 U.S.C. § 7101 app. at 1031.

52. See LABOR-MANAGEMENT RELATIONS TASK FORCE, FEDERAL PERSONNEL MANAGEMENT PROJECT, OPTION PAPER NUMBER FOUR (1977) [hereinafter PERSONNEL PROJECT], *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 1393.

for conducting operations.<sup>53</sup> Permissive subjects included an agency's mission; budget; organization; number of total employees; and the numbers, types, and grades of employees assigned to an organizational unit.<sup>54</sup>

The Senate Committee on Governmental Affairs produced a bill reflecting President Carter's wishes. The Senate Committee Report accompanying the bill confirmed that the "policies and approaches of Executive Order 11491 . . . have provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. . . . [T]hese measures will promote effective labor-management relationships in Federal operations."<sup>55</sup> The version that eventually passed the floor vote in the Senate retained the language of the Executive Order.<sup>56</sup>

However, in the House of Representatives, passage of the President's civil service reform encountered difficulty.<sup>57</sup> The House Committee on Post Office and Civil Service proved to be "a stronghold for allies of federal employee unions and bureaucratic interests who opposed the management-oriented bill."<sup>58</sup> The bill reported to the House floor completely discarded Carter's proposed Title VII labor-management section.<sup>59</sup>

The bill reported to the full House contained the first semblance of the current § 7106(b) language—an explicit requirement to negotiate procedures management would use in exercising its authority under § 7106(a) and appropriate arrangements for employees adversely affected by management's exercise of authority.<sup>60</sup> Section 7106(a) eliminated several reserved rights protected under the Execu-

53. See Order 11,491, *supra* note 50, at 199-200, *reprinted as amended in* 5 U.S.C. § 7101 app. at 1031.

54. See *id.* at 199, *reprinted as amended in* 5 U.S.C. § 7101 app. at 1031. For a review of the classification of subjects of bargaining under the Executive Order System and proposed reform options in 1977, see PERSONNEL PROJECT, *supra* note 52, *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 391-98.

55. See S. REP. NO. 95-969, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2734.

56. See *id.*, at 109, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2831 (the Senate generally retained the reserved rights of Executive Order 11,491). Compare S. 2640, 95th Cong. § 7218(a)(2) (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 589-90 (generally retaining management rights language of Executive Order 11,491), with Order 11,491, *supra* note 50, at 199, *reprinted as amended in* 5 U.S.C. § 7101 app. at 1031 (listing management's reserved rights).

57. See Ingraham, *supra* note 45, at 23.

58. Kathy Sawyer, *Carter's Civil Service Victory Confounds Capital's Cynics*, WASH. POST, Oct. 14, 1978, at A2.

59. The House Committee on Post Office and Civil Service had deleted completely all language after the enacting clause. See H.R. REP. NO. 95-1403, at 1 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 677.

60. See H.R. 11,280, 95th Cong. § 7106(b) (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 16, at 391-92.

tive Order such as determining promotion policy, job classification, and reduction-in-force standards and procedures.<sup>61</sup>

The committee intended "to achieve a broadening of the scope of collective bargaining to an extent greater than the scope . . . under the Executive Order."<sup>62</sup> However, the committee simultaneously wanted to "preserve the essential prerogatives and flexibility Federal managers must have."<sup>63</sup> In supplemental views to the Committee Report, several representatives tried to allay fears that the collective bargaining rights of federal employees had been expanded significantly.<sup>64</sup> In particular, the representatives cited the absence in the bill of the right to strike, the right to bargain collectively over pay and fringe benefits, and the right to negotiate an agency shop.<sup>65</sup>

Once on the House floor, members of Congress debated H.R. 11280 and offered numerous amendments.<sup>66</sup> Representative Ford,<sup>67</sup> surprised by the "rhetoric and hysteria" about Title VII, emphasized that the bill was not a radical departure from the Executive Orders but simply a small increase in union bargaining powers.<sup>68</sup> An amendment that would have replaced the entirety of the House Committee's version of Title VII with the language of Executive Order 11491 failed to reach a vote.<sup>69</sup>

The House finally overwhelmingly passed Representative Udall's substitute amendment for Title VII.<sup>70</sup> This amendment contained the current prefatory language of § 7106(a) "[s]ubject to subsection (b) of

61. Compare H.R. 11,280, § 7106(a)(2), reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 391 (prohibiting negotiations on an agency's mission, budget, organization, number of employees, internal security practices; and retaining the right to direct employees and take actions during national emergencies) with Order 11,491, *supra* note 50, at 199, reprinted as amended in 5 U.S.C. § 7101, app. at 1031 (additionally prohibiting negotiations over hiring, promoting, transferring, assigning, retaining, suspending, demoting, and discharging employees).

62. H.R. REP. NO. 95-1403, at 43, reprinted in LEGISLATIVE HISTORY, *supra* note 16, app. at 689.

63. *Id.* at 43-44, reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 689-90.

64. *Id.* at 377, reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 721.

65. *Id.* at 377, reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 721.

66. E.g. 124 CONG. REC. 29,190 (1978) (describing amendments to substitute amendments of H.R. 11,280).

67. Representative Udall, the sponsor of the Amendment that eventually became the accepted version of the FSLMRS, lauded Representative Ford's "key, critical role" in forging the compromise for labor relations reform. See *id.* at 29,197.

68. *Id.* at 25,721.

69. Representative Collins introduced an amendment to H.R. 11280 that would have replaced Title VII with the Senate's version, reflecting the Carter Administration's preference for the codified Executive Order system. See *id.* at 29,167, 29,185. However, it was agreed that Representative Udall's substitute for the Collins Amendment would be voted on instead. See *id.* at 29,202.

70. The substitute amendment passed with 381 Ayes and 0 Noes. See *id.*

this section . . . .”<sup>71</sup> Under § 7106(a), management recovered some of the reserved rights that the House Committee on Post Office and Civil Service had discarded.<sup>72</sup> The permissive bargaining subjects under § 7106(b)(1) made their first appearance in this amendment.<sup>73</sup> Representative Ford explained that the inclusion of permissive subjects of bargaining under § 7106(b)(1) “has no substantive effect on the status quo. In fact, we are picking up the language of the management rights clause, as it is referred to in the Executive order, by tailoring it to fit the structure of this bill . . . .”<sup>74</sup> The right to bargain over procedures and appropriate arrangements was retained as § 7106(b)(2) and (3).<sup>75</sup> Representative Clay stressed that although more management rights had been added under § 7106(a), nothing “preclude[s] negotiations over procedures or adverse effects involved in those rights.”<sup>76</sup> In addition, Representative Udall’s sectional analysis of § 7106(b)(1) indicated that nothing in the management rights clause should prevent an agency at its discretion from negotiating with a union the methods and means of doing work or the numbers of employees assigned to an organizational subdivision.<sup>77</sup> In conference committee, the House version of § 7106 of the FSLMRS eventually won approval.<sup>78</sup>

Two points from the preceding history should be stressed. First, much of the legislative history indicates the FSLMRS was not intended to expand significantly union bargaining rights beyond the Executive Order system. President Carter and the Senate desired merely to codify Executive Order 11491.<sup>79</sup> While the House Committee on Post Office and Civil Service initially removed several management reserved rights that had existed under the Executive Orders, the final version of the FSLMRS contained even more prohibited subjects of

71. *Id.* at 29,176. See *id.* at 29,174 to 29,182 for the entire text of Representative Udall’s Substitute Amendment.

72. Compare H.R. 11,280, 95th Cong. § 7106(a) (1978), reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 372, 391 (reserving 10 management rights), with 124 CONG. REC. 29,183 (1978) (adding 9 more reserved rights including hiring, assigning, directing, layoff, retaining, suspending, and removing employees; reducing an employee’s grade or pay; and making personnel selections from ranked candidates).

73. See 124 CONG. REC. 29,183 (1978).

74. *Id.* at 29,195.

75. See *id.* at 29,183.

76. *Id.* at 29,187.

77. See *id.* at 29,183.

78. In the several reported discrepancies between the House and Senate versions of the management rights section, the Senate receded. See H.R. REP. NO. 95-1717, at 153-54 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2887-88.

79. See H.R. REP. NO. 95-1403, at 12 (1978), reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 675, 682; S. REP. NO. 95-969, at 12 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2734.

bargaining than originally existed under the Executive Orders.<sup>80</sup> Alan Campbell, a former Chairman of the U.S. Civil Service Commission and Director of the U.S. Office of Personnel Management,<sup>81</sup> criticized the use of "peripheral legislative history and ambiguous statements to . . . misread the essential legislative intent to codify Executive Order 11491."<sup>82</sup> Thus, any legislative analysis of § 7106(a) and (b) must consider the fact that the FSLMRS maintained the limited scope of bargaining for federal sector unions.

Second, three selections from the legislative history indicate that the items contained in § 7106(b) were intended to be a narrow and separate category of subjects compared to the management rights contained in § 7106(a). In explaining the differences between the House and Senate versions of the management rights clause, the Conference Committee Report stated that "[b]oth bills specified certain matters on which the parties may not negotiate under any circumstances and certain *other matters* on which the agency, may, in its discretion, negotiate."<sup>83</sup> The use of the words "other matters"<sup>84</sup> indicates Congress envisioned § 7106(b)(1) subjects as items separate and different from § 7106(a) reserved rights.

The Conference Committee Report then proceeded to describe limitations on an agency's ability to negotiate § 7106(b)(1) subjects with a union. While describing that § 7106(b)(1) grants a federal agency the discretion to bargain about the methods and means of performing work, the Report further stressed that certain subjects like an agency's general policy decisions were not intended to fall under the definition of methods and means.<sup>85</sup> To provide the public with "as effective and efficient a Government as possible," Congress did not intend:

80. Under the Executive Order labor relations system, an agency's mission, budget, organization, number of employees, and internal security practices were all permissive subjects of bargaining. See PERSONNEL PROJECT, *supra* note 52, reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 1391, 1396-97. However, all these rights were included in the FSLMRS as prohibited subjects of bargaining. See 5 U.S.C. § 7106(a)(1)(1994).

81. Campbell contributed to the passage of the civil service reform package by unifying support from a broad "spectrum of groups" including organized labor. Sawyer, *supra* note 58, at A2.

82. Donald F. Parker et al., *Labor-Management Relations Under CSRA: Provisions and Effects*, in LEGISLATING BUREAUCRATIC CHANGE 161, 163 (Patricia W. Ingraham & Carolyn Ban eds., 1984) (quoting a letter from Alan K. Campbell to the GAO in 1980).

83. H.R. REP. NO. 95-1717, at 153, reprinted in 1978 U.S.C.C.A.N. 2860, 2887 (emphasis added).

84. *Id.*

85. See *id.* H.R. REP. NO. 95-1717, at 154, reprinted in 1978 U.S.C.C.A.N. 2860, 2887.

[t]he phrase "methods and means" . . . to authorize IRS to negotiate with a labor organization over how returns should be selected for audit, or how thorough the audit of the returns should be. It does not subject to the collective bargaining agreement the judgment of EPA about how to select recipients for the award of environmental grants.<sup>86</sup>

The above selection indicates that a § 7106(b)(1) subject—methods and means of performing work—was not intended simultaneously to incorporate an agency's right to set broad policies in order to accomplish its stated mission. Thus, negotiations over an agency's entire mission and budget<sup>87</sup> are by definition different than negotiations over the numbers, types, and grades of employees assigned to an organizational subdivision or the methods and means of performing work.<sup>88</sup>

Finally, after the passage of the CSRA of 1978, Representative Ford further explained the intended relationship of § 7106(a) and (b):

By the clear language of the bill itself, any exercise of the enumerated management rights is *conditioned* upon the full negotiation of arrangements regarding adverse effects and procedures. As is made clear by the absence of the phrase "at the election of the agency," procedures and arrangements are mandatory subjects of collective bargaining. Only after this obligation has been completely fulfilled is an agency allowed to assert that a retained management right bars negotiations over a particular proposal. . . .

. . . If for example, an agency initially contemplates transferring 10 employees into quarters suitable for only half that number, an "appropriate arrangement" cannot be negotiated without changing (at least somewhat) the number of employees to be relocated. . . . In the example cited, the agency enjoys a retained management right to transfer all 10 employees only after procedures and appropriate arrangements are agreed upon.<sup>89</sup>

Representative Ford utilized the word "conditioned" to describe the relationship between § 7106(a) and (b).<sup>90</sup> "Conditioned" implies that § 7106(a) rights exist independent of § 7106(b) subjects of bargaining and will not be forfeited if in direct conflict with § 7106(b).<sup>91</sup> To enjoy its reserve right, management first must fulfill its obligation

86. *Id.*

87. See 5 U.S.C. § 7106(a)(1)(1994).

88. See 5 U.S.C. § 7106(b)(1).

89. 124 CONG. REC. 38,715 (1978)(emphasis added).

90. *Id.*

91. "Conditioned" or "conditional" means "[t]hat which is dependent upon or granted subject to a condition." BLACK'S LAW DICTIONARY 294 (6th ed. 1990). A condition is "[a] future and uncertain event upon the happening of which is made to depend the existence of an obligation." *Id.* at 293. Applying these definitions to the present context, the agency's bargaining over § 7106(b) matters is the future and uncertain event. An agency's right not to bargain on § 7106(a) matters depends on whether the agency initially fulfills its obligation to bargain § 7106(b) subjects.

to negotiate procedures and appropriate arrangements with a union.<sup>92</sup> This conditional relationship suggests § 7106(b) contains a conceptually separate category of subjects requiring negotiations before § 7106(a) rights come into play.

In his hypothetical, Representative Ford implied that an agency may be forced through negotiations with the union to either construct an addition to the quarters to accommodate the extra five individuals or set up a rotation schedule so no more than five individuals work simultaneously in the quarters. However, the agency would always retain a broad policy right, which it could not negotiate away to the union, to transfer the ten employees. Based on this analysis, appropriate arrangements and procedures are conceptually separate and narrow subjects when compared to broad reserved rights.

### C. *Judicial Interpretation of § 7106(a) and (b)(1)*

After the passage of the FSLMRS, the FLRA and federal courts did not explore the relationship between § 7106(b)(1) permissive subjects and § 7106(a) prohibited subjects. The question of whether a union proposal properly consisted of a prohibited or permissive subject was largely irrelevant due to an agency's perpetual ability to use its discretion under § 7106(b)(1) to refuse to negotiate the subject.<sup>93</sup> However, the FLRA and federal courts extensively developed the relationship between § 7106(a) and § 7106(b)(2) and (b)(3).<sup>94</sup> In particular, the United States Court of Appeals for the District of Columbia Circuit provided many interpretations of the relationship between these two sections.<sup>95</sup> As will be shown, the court reflected the legislative intent described in the last section by acknowledging that § 7106(a) and (b)(2) are mutually exclusive, and that procedures and appropriate arrangements are ultimately limited by § 7106(a) reserved rights.

The FLRA had limited opportunities to rule on the direct relationship between § 7106(a) and (b)(1) in the years following the pas-

92. See 124 CONG. REC. 38,715 (1978).

93. See SHAPIRO & EVANS, *supra* note 10, at I-8; see also FLRA, OFFICE OF THE GENERAL COUNSEL, REFERRAL OF A MAJOR POLICY ISSUE FOR A GENERAL RULING 7 (Feb. 28, 1995), reprinted in FLRA, PUB. NO. 95-2 FLRA NEWS (1995) [hereinafter FLRA REFERRAL].

94. For a historical and current analysis of the FLRA's treatment of procedures and appropriate arrangements, see generally PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE 434-63 (1994).

95. Cf. *American Fed'n Gov't Employees, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) (recognizing the negotiability of an arrangement unless it is inappropriate due to excessive interference with a reserved right); *Department of Defense, Army-Air Force Exch. Serv. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (approving the FLRA's "acting at all" test).

sage of the FSLMRS. Except for unique situations like those found in *ACT*,<sup>96</sup> the FLRA had no need to decide whether a union proposal constituted a § 7106(a) reserved right or a § 7106(b)(1) permissive subject since both subsections would render the union proposal non-negotiable.<sup>97</sup> Before Executive Order 12871's mandate to agencies to negotiate permissive subjects, agencies could consider a union proposal dealing with a permissive subject, confer with the union about it, and still withdraw from consideration of the union proposal prior to any final agreement.<sup>98</sup>

Most § 7106(b)(1) litigation involved the identification of a permissive subject rather than distinguishing between a permissive and prohibited subject of bargaining.<sup>99</sup> Subsequently, the FLRA issued numerous decisions defining the "numbers, types, and grades of employees . . . assigned to [an] organizational subdivision," and the "methods, and means of performing work."<sup>100</sup>

For example, the FLRA defined means as "any instrumentality, including an agent, tool, device, measure, plan or policy used by an agency for the accomplishing or furthering of the performance of its work."<sup>101</sup> The FLRA defined method as "the way in which an agency performs its work."<sup>102</sup> The FLRA also developed a test for identifying when a union proposal dealt with a method and means of performing work.<sup>103</sup>

96. In *ACT*, the agency at the bargaining unit level had agreed already to negotiate a union proposal concerning a permissive subject of bargaining. *Association of Civilian Technicians*, Mont. Air Ct. No. 29 v. FLRA, 22 F.3d 1150, 1152 (D.C. Cir. 1994). Only after the union and agency at the local level had agreed to the proposal did the agency head decide not to honor the agreement. *See id.* However, the agency at the local level always had the opportunity initially to refuse to negotiate the permissive subject.

97. *See FLRA REFERRAL*, *supra* note 93, at 7.

98. Representative Ford indicated an agency was "under no obligation to bargain [a permissive subject], but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table." 124 CONG. REC. 29,195 (1978); *see American Fed'n Gov't Employees*, Nat'l Immigration & Naturalization Serv. Council, 8 F.L.R.A. 347, 381-82 (1982).

99. *Cf. American Fed'n Gov't Employees*, Local 1923, 44 F.L.R.A. 1405, 1530-34 (1992) (considering, in turn, whether a union proposal was a § 7106(b)(1) permissive or a § 7106(a) prohibited subject, but not distinguishing between the categories); *American Fed'n Gov't Employees*, Nat'l Council VA Locals, 29 F.L.R.A. 515, 543-45 (1987) (considering, in turn, whether a union proposal calling for adequate staff levels was a § 7106(b)(1) permissive or a § 7106(a) prohibited subject, but not distinguishing between the categories).

100. 5 U.S.C. § 7106(b)(1)(1994).

101. *American Fed'n State, County & Mun. Employees*, Local 2910, 19 F.L.R.A. 1180, 1181 (1985).

102. *Id.* The FLRA has defined performing work as including "those matters which directly and integrally relate to the agency's operations as a whole." *Id.*

103. The FLRA first examines whether there is a "direct relationship" between the agency's method or means and the accomplishment of the agency's mission. *American Fed'n Gov't Employees*, Local 1923, 44 F.L.R.A. at 1531. If so, then the FLRA determines whether the union's



Unlike § 7106(b)(1), the FLRA and the courts extensively ruled on the proper relationship between § 7106(b)(2) and § 7106(a). Section 7106(b)(2) requires an agency to negotiate the procedures it will observe when exercising its authority under § 7106.<sup>104</sup> The United States Court of Appeals for the District of Columbia Circuit early recognized the FSLMRS's establishment of a "hierarchy, in which the terms of subsection (b) hold priority over those of subsection (a)."<sup>105</sup> However, the court also recognized the mutual exclusivity between § 7106(a) reserved rights and § 7106(b)(2) procedures. A union proposal that directly interfered with a § 7106(a) reserved right was by definition not a procedure.<sup>106</sup> Thus, in order to determine the negotiability of a union proposal, the FLRA currently defines whether the proposal is truly a procedure or whether it is something other than a procedure due to its interference with a § 7106(a) substantive right.

The FLRA now utilizes two tests to determine whether a union proposal deals with a mandatory negotiable procedure under § 7106(b)(2) or a management reserved right under § 7106(a).<sup>107</sup> If the union proposal concerns a "pure procedure," the proposal is negotiable as long as it does not "prevent the agency from 'acting at all.'"<sup>108</sup> However, if the union proposal contains some aspects of both procedure and substance, the FLRA determines negotiability by analyzing whether the proposal directly interferes with a management right.<sup>109</sup> While the United States Court of Appeals for the District of Columbia Circuit recently reaffirmed in broad terms that § 7106(a) rights are subordinate to § 7106(b)(2) procedures,<sup>110</sup> the FLRA and courts effectively limit this view every time they utilize the "acting at all" or "direct interference" tests.

counterproposal "would directly interfere with the mission-related purpose for which the method or means was adopted." *Id.* at 1531-32. If such a direct interference exists, the agency has no duty to bargain because the union proposal only deals with a permissive subject of bargaining.

104. 5 U.S.C. § 7106(b)(2).

105. *Department of Defense, Army-Air Force Exch. Serv. v. FLRA*, 659 F.2d 1140, 1153 (D.C. Cir. 1981).

106. The court stressed the need for differentiating between § 7106(b)(2) procedures and § 7106(a) substantive rights, lest a "procedure is to be permitted to swallow substance entirely." *Id.* at 1152.

107. *See National Fed'n Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834, 840 (D.C. Cir. 1987).

108. *See id.* (citing *Department of Defense v. FLRA*, 659 F.2d 1140, 1152-53 (1981)).

109. *See id.* (citing 659 F.2d at 1159).

110. *See Association Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

Section 7106(b)(3) is treated by the FLRA and courts in a similar fashion. Section 7106(b)(3) identifies "appropriate arrangements for employees adversely affected by the exercise of" management authority as mandatory subjects of bargaining.<sup>111</sup> However, like proposed procedures, union proposals must be properly classified as appropriate arrangements before the FLRA will find them negotiable. A union first must show that its proposal relates only to adverse effects produced by the exercise of management's reserved rights.<sup>112</sup> Beyond finding a relation to adverse effects, the FLRA still must determine whether the union proposal constitutes "an appropriate arrangement."<sup>113</sup> To do this, the FLRA utilizes the "excessive interference test" as developed by then Judge Scalia and the United States Court of Appeals for the District of Columbia Circuit.<sup>114</sup>

In *American Federation of Government Employees, Local 2872 v. FLRA*,<sup>115</sup> Judge Scalia noted in dicta that the prefatory clause to § 7106(b), which states "[n]othing in this section shall preclude,"<sup>116</sup> can either be interpreted as clarifying or limiting language.<sup>117</sup> Judge Scalia explained that while the prefatory clause acted as clarifying language in relation to § 7106(b)(2), it acted as limiting language to § 7106(b)(3).<sup>118</sup> Therefore, § 7106(b)(2) should be treated as mutually exclusive of § 7106(a) reserved rights. However, § 7106(b)(3) is a limitation, or exception, to § 7106(a) reserved rights.<sup>119</sup> Thus, the FLRA could not declare a union proposal concerning appropriate arrange-

111. 5 U.S.C. § 7106(b)(3).

112. The proposal must "redress only those employees adversely affected by a management action." *United States Dep't of Interior, Minerals Management Serv., New Orleans, La. v. FLRA*, 969 F.2d 1158, 1162 (D.C. Cir. 1992); *accord United States Dep't of Justice, Immigration and Naturalization Serv. v. FLRA*, 975 F.2d 218, 225 (5th Cir. 1992) (holding an appropriate arrangement must narrowly protect those employees adversely affected by the exercise of management rights).

113. *National Treasury Employees Union*, Ch. 26, 22 F.L.R.A. 314, 317 (1986).

114. *See National Ass'n Gov't Employees, Local R14-87*, 21 F.L.R.A. 24, 30 (1986).

115. 702 F.2d 1183 (D.C. Cir. 1983).

116. 5 U.S.C. § 7106(b).

117. *See American Fed'n Gov't Employees, Local 2872*, 702 F.2d at 1186. Judge Scalia provided the following hypothetical to explain the difference:

For example, a provision saying that "red is included" may be followed by a statement that "nothing in this section shall apply to dark pink." When this clarifying language usage is employed, something which comes within the proviso cannot simultaneously come within the principal provision. The two categories are mutually exclusive—the color is *either* red *or* dark pink. In other instances, however, the proviso is used genuinely to alter what precedes: "Nothing in this section shall apply to red tint No. 43." Under this usage, the excepted item is included *both* within the principal provision *and* (in order to except it) within the proviso—red tint No. 43 *is* red.

*Id.* at 1186-87.

118. *See id.* at 1187.

119. *See id.*

ments nonnegotiable simply because it infringed on a management reserved right.<sup>120</sup>

Nevertheless, Judge Scalia hesitated to declare that § 7106(b)(3) was an absolute exception to § 7106(a) reserved rights by centering on the adjective "appropriate."<sup>121</sup> Some arrangements proposed by a union still might be inappropriate because they "impinge upon management prerogatives to an excessive degree."<sup>122</sup> Based on this statement, the FLRA adopted the "excessive interference test" to determine whether an arrangement proposed by a union would still be trumped by a management right.<sup>123</sup>

One point from the preceding judicial history should be stressed. The FLRA and courts consistently have recognized that two of the three subsections of § 7106(b) are not absolute exceptions to § 7106(a). Although § 7106(b)'s priority over § 7106(a) has sometimes been described in overly broad terms,<sup>124</sup> the FLRA and courts have not relied on this priority to totally eviscerate § 7106(a) reserved rights. Specifically, § 7106(b)(2) procedures cannot prevent an agency from acting at all; nor can it directly interfere with the exercise of a reserved right.<sup>125</sup> Similarly, a § 7106(b)(3) arrangement cannot excessively interfere with the exercise of a § 7106(a) reserved right lest it be declared "inappropriate."<sup>126</sup> Thus, by using tests to determine when a union proposal is properly defined as a procedure or appropriate arrangement, the courts and FLRA have effectively established mutual exclusivity between § 7106(a) and (b) and limited the scope of § 7106(b) subjects of bargaining.

120. "The Authority is incorrect, therefore, in its conclusion that proof of coverage by subsection (a) is automatically proof of nonexemption under subsection (b)." *Id.*

121. Appropriate describes the "arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(3).

122. *American Fed'n Gov't Employees, Local 2782*, 702 F.2d at 1188.

123. See *National Ass'n Gov't Employees, Local R14-87*, 21 F.L.R.A. at 30. The FLRA weighs the "competing practical needs of employees and managers" to determine whether a proposed arrangement excessively interferes with a management reserved right. *Id.* at 31-32.

124. "Section 7106, we held, makes clear that the duty to bargain over matters falling under subsections (b)(2) and (b)(3) exists 'notwithstanding that implementation of the proposal would affect the enumerated managerial rights.' . . . In that sense, we have already decided that § 7106(b) is indisputably an exception to § 7106(a)." *Association Civilian Technicians, Mont. Air Ch. No. 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994) (citations omitted) (quoting *American Fed. Gov't Employees, Local 1923 v. FLRA*, 819 F.2d 306, 308 (D.C. Cir. 1987)).

125. See *supra* text accompanying notes 108-10.

126. See *American Fed'n Gov't Employees, Local 2782*, 702 F.2d at 1188.

## II. EXECUTIVE ORDER 12871 AND ITS EFFECTS ON § 7106(a) AND (b)(1)

Critical opinions of the FSLMRS emerged in the late 1980s.<sup>127</sup> In 1988, the House Subcommittee on Civil Service held hearings concerning the effectiveness of federal labor-management relations under the FSLMRS.<sup>128</sup> Although the hearings did not lead to any modifications to the FSLMRS, the hearings did highlight the increasing dissatisfaction of federal unions with the federal labor-management system.<sup>129</sup>

In 1991, the United States General Accounting Office ("GAO") surveyed experts in federal labor relations to determine how well the federal labor relations program was working.<sup>130</sup> GAO found that most of these experts agreed that federal collective bargaining had not achieved the goals of the FSLMRS<sup>131</sup> and had produced overly legalistic and adversarial relationships between management and unions over minor disputes.<sup>132</sup> Since federal sector unions, unlike the private sector, could not provide their members with substantial gains such as increased wages and fringe benefits, they were prompted to present an activist image by fully challenging agencies on those minor issues which were within their bargaining power.<sup>133</sup> The survey respondents

127. See, e.g., Charles J. Coleman, *Federal Sector Labor Relations: A Reevaluation of the Policies*, 16 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 37, 44 (1987) ("The limited scope of bargaining in the Executive Branch appears to breed a kind of frustration that often has dysfunctional consequences . . ."); *FLRA Official Faults Practitioners for Excess "Litigation and Minutiae,"* 27 Gov't Empl. Rel. Rep. (BNA) No. 1336, at 1361 (Oct. 23, 1989) (FLRA Regional Director blaming union "hair-trigger" filings and agency "boilerplate denials" for excess litigation); Judith Havemann, *Federal Labor Relations: An Administrative Maze*, WASH. POST, Apr. 5, 1988, at A19 (comparing federal labor-management law to "the machinery of the United Nations . . . resolv[ing] a fender-bender"); Parker et al., *supra* note 82, at 176 (finding no significant change in labor-management relations in the federal government since passage of the CSRA).

*Title VII of the Civil Service Reform Act of 1978: Hearing Before the Subcomm. on OGBL Service of the House Comm. Post Office and Civil Service*, 100th Cong. (1988).

129. Representative Schroeder, after describing several "frightening examples" of labor-management disputes, declared Congress must "fix this mess soon." *Id.* at 1-2. Robert Tobias, President of the National Treasury Employees Union, called for entirely eliminating the FSLMRS and replacing it with a system of partnerships where "one party cannot gain without the other." Frank Swoboda, *Civil Service Law Needs Another Overhaul, Union Chiefs Say*, WASH. POST, June 9, 1988, at A17.

130. GAO, *supra* note 1, at 14-15.

131. The goals of the FSLMRS included efficient government, the settlement of labor-management disputes in a less adversarial manner, and the involvement of government employees in decisions affecting their working conditions. See *id.* at 18.

132. See *id.*

133. As one agency official stated, "[t]he minutiae we have to bargain over is a trade off. It is sort of cathartic in the fact that it lets the unions believe that they are really negotiating something, while from management's standpoint, they are non-important issues." *Id.* at 21. Examples of trivial issues included radio use at worksites, coffee consumption on breaks, the removal of a water cooler, and requirements for civilian guards to salute military personnel. See *id.* at 20-21.

also agreed that the dispute resolution processes were "too slow, complex, and susceptible to delaying and stalling tactics by the parties involved."<sup>134</sup>

In partial response to this growing dissatisfaction with the federal labor-management relations program, Vice-President Al Gore's National Performance Review ("NPR")<sup>135</sup> recommended the creation of a National Partnership Council to help encourage the establishment of labor-management partnerships throughout the federal government.<sup>136</sup> The theory of cooperative relations between labor and management had gained support as a more effective and efficient means of labor relations versus the traditional adversarial and legalistic relationships described by GAO.<sup>137</sup> In addition, the NPR recommended that the National Partnership Council propose changes to the FSLMRS that would encourage the success of federal sector partnerships.<sup>138</sup>

In response to the NPR's recommendations, President Clinton issued Executive Order 12871 which mandated federal agencies to establish a new cooperative system of bargaining with their respective unions.<sup>139</sup> President Clinton envisioned that the creation of new federal sector partnerships would "champion change in Federal Government agencies to transform them into organizations capable of delivering the highest quality services to the American people."<sup>140</sup>

Besides mandating partnerships throughout the federal government, President Clinton ordered agencies and subordinate officials to bargain over previously permissive subjects enumerated under

134. *Id.* at 41.

135. The NPR was a 6-month study of the federal government directed by Vice-President Gore in 1993 to "make government work better and cost less." NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS at i (1993).

136. *See id.* at 88.

137. *See, e.g.,* TEAMWORK: JOINT LABOR-MANAGEMENT PROGRAMS IN AMERICA (Jerome M. Rosow ed., 1986) (providing case studies of labor-management joint efforts); Ira B. Lobel, *Labor-Management Cooperation: A Critical View*, 43 LAB. L.J. 281 (1992) (describing the value of cooperative efforts between labor and management in certain circumstances); Alexander B. Trowbridge, *Avoiding Labor-Management Conflict*, MGMT. REV., Feb. 1988 at 46 (stressing the need for labor-management cooperation and describing new cooperative approaches); Paula B. Voos, *The Influence of Cooperative Programs on Union-Management Relations, Flexibility, and Other Labor Relations Outcomes*, 10 J. LAB. RES. 103 (1989) (providing survey results indicating that quality of worklife programs generally have positive effects on union-management relations). *But cf.* Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 233 (1990) (warning that cooperation with management will not produce benefits for unions).

138. *See* NATIONAL PERFORMANCE REVIEW, *supra* note 135, at 88.

139. Order 12,871, *supra* note 8, at 657, *reprinted in* 5 U.S.C. § 7101, at 1033.

140. Order 12,871, *supra* note 8, at 655, *reprinted in* 5 U.S.C. § 7101, at 1033.

§ 7106(b)(1).<sup>141</sup> Agencies now were required to bargain over “the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.”<sup>142</sup> Executive Order 12871 effectively created only two categories of subjects of bargaining in the federal sector: mandatory and prohibited.

Prior to *ACT*, the Executive Order’s mandate would not have presented federal agencies with difficult bargaining choices. Before *ACT*, most members of the federal labor relations community believed that conflict with § 7106(a) reserved rights still could relieve an agency from the duty to bargain with a union over § 7106(b)(1) subjects.<sup>143</sup> Therefore, notwithstanding the Executive Order, an agency assumed it was under no obligation to negotiate a union proposal under § 7106(b)(1) if the proposal also conflicted with a § 7106(a) reserved right. As developed in the next Section however, *ACT*, in conjunction with Executive Order 12871, denied an agency this option and effectively presented unions with a way to begin negotiating § 7106(a) reserved rights.

### III. THE *ACT* DECISION

#### A. *FLRA’s Initial Decision*

In *National Guard Bureau, Alexandria, Virginia and Association of Civilian Technicians, Montana Air Chapter No. 29*,<sup>144</sup> the union had executed a collective bargaining agreement with the Montana National Guard. Article 23 of the agreement authorized bargaining unit “employees to have the option of wearing either the military uniform or an agreed-upon standard civilian attire.”<sup>145</sup> However, when the Montana National Guard sent the agreement to the National Guard Bureau in Alexandria, Virginia for final approval, the National Guard Bureau rejected Article 23 because it violated: (1) a national policy concerning the wearing of uniforms and (2) management’s reserved

141. See Order 12,871, *supra* note 8, at 657, reprinted in 5 U.S.C. § 7101, at 1033, 1034.

142. 5 U.S.C. § 7106(b)(1)(1994).

143. The U.S. Office of Personnel Management acknowledged that a § 7106(b)(1) subject would become nonnegotiable if in direct conflict with a § 7106(a) right when it advised agencies and unions to “focus on the intent of the proposal and on ways to reformulate it in a manner that does not result in a conflict with § 7106(a).” NATIONAL PARTNERSHIP COUNCIL, PARTNERSHIP HANDBOOK 31 (1994); see also FLRA REFERRAL, *supra* note 93, at 5 (indicating that case law before Executive Order 12871 held that § 7106(a) rendered a proposal nonnegotiable even though falling within § 7106(b)(1)).

144. 45 F.L.R.A. 506 (1992), *rev’d sub nom.*, Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA, 22 F.3d 1150 (D.C. Cir. 1994).

145. *Id.* at 507.

rights to determine internal security practices.<sup>146</sup> The union subsequently filed an unfair labor practice charge against the agency.<sup>147</sup>

The FLRA General Counsel and union contended that, under § 7114(c)(2), the agency head was precluded from rejecting the collective bargaining agreement<sup>148</sup> unless the agreement violated "the provisions of [the FSLMRS] and any other applicable law, rule, or regulation."<sup>149</sup> The union separately maintained that the agency could not use the defense of a violation of § 7106(a)(1) because the wearing of uniforms is a method and means of performing work under § 7106(b)(1), and all subjects contained in § 7106(b) are clearly exceptions to § 7106(a).<sup>150</sup>

The FLRA found that the National Guard Bureau did not commit an unfair labor practice by refusing to approve the uniform clause.<sup>151</sup> Without elaboration, the FLRA rejected the union's argument by simply stating it was "unsupported by case law or any other explanation."<sup>152</sup>

#### *B. The United States Court of Appeals for the District of Columbia Circuit's Reversal*

The union appealed the FLRA's decision to the United States Court of Appeals for the District of Columbia Circuit.<sup>153</sup> The court reversed the FLRA's decision, finding that a literal reading of the FSLMRS, in addition to prior case law, supported the conclusion that § 7106(b)(1) subjects were exceptions to § 7106(a) reserved rights.<sup>154</sup> Because the agency agreed on a § 7106(b)(1) permissive subject, and because § 7106(b)(1) is an exception to management's § 7106(a) reserved rights, the agency head could not later rely on § 7106(a) as a reason for refusing to approve the uniform agreement.<sup>155</sup>

Without referring to legislative history, the court relied on the plain language of the FSLMRS and stated "Congress has spoken to

146. See *id.* at 507-08.

147. See *id.* at 506.

148. See *id.* at 508, 512.

149. 5 U.S.C. § 7114(c)(2) (1994).

150. See *National Guard Bureau Alexandria, Va.*, 45 F.L.R.A. at 512. The FLRA General Counsel did not use this argument.

151. See *id.* at 520.

152. *Id.*

153. See *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150 (D.C. Cir. 1994).

154. See *id.* at 1155-56.

155. It is important to note that the court presumed the uniform proposal fell within both the meaning of § 7106(b)(1) as a means of performing work and § 7106(a) as an internal security practice. The FLRA and the agency conceded this point on appeal. See *id.* at 1154.

the precise issue in question and commanded a result contrary to that arrived at by the FLRA."<sup>156</sup> The court also relied on its own past interpretations of the relationship between § 7106(a) and § 7106(b)(2) and (3) to support the view that § 7106(b)(1) was an exception to § 7106(a).<sup>157</sup> Actually utilizing the word "exception," the court indicated that a § 7106(b)(1) permissive subject of bargaining is negotiable at the election of an agency regardless of the proposal's interference with a § 7106(a) reserved right.<sup>158</sup>

Prior to Executive Order 12871, the court's decision would have affected federal agencies minimally. The narrow ruling of *ACT* only prohibited an agency head from later overturning a locally negotiated contract if the subject matter was a § 7106(b)(1) permissive subject of bargaining.<sup>159</sup> However, local agency officials still could have *initially* refused to bargain with the union on the wearing of uniforms,<sup>160</sup> leaving the union with no recourse, since methods and means of performing work are only permissive subjects of bargaining.<sup>161</sup>

But, due to Executive Order 12871, an agency no longer has the discretion to *initially* refuse to bargain a § 7106(b)(1) subject.<sup>162</sup> After *ACT*, federal agencies face the potential of negotiating with unions § 7106(b)(1) subjects that also infringe on § 7106(a) reserved rights.

### C. FLRA's Response to ACT

The General Counsel of the FLRA recognized that *ACT* "made it extremely difficult, if not impossible, for . . . agencies . . . to enter into improved consensual and collaborative relationships with their employees' elected representatives."<sup>163</sup> Federal agencies and unions were tempted to engage "in legal gymnastics over the scope of bargaining" instead of avoiding litigation through the exercise of labor-management partnerships.<sup>164</sup> To provide guidance and settle the un-

156. *Id.* at 1156.

157. *See id.* at 1155.

158. *See id.*

159. *See id.* at 1155-56.

160. *See supra* note 93 and accompanying text.

161. *See* 5 U.S.C. § 7106(b)(1) (1994).

162. *See supra* Part II.

163. FLRA ADVICE, *supra* note \*, at 2.

164. *Id.* The General Counsel provided an example of the typical strategic positions adopted by management and union officials:

[T]he union requests to negotiate over matters, either as part of midcontract or change bargaining, which matters clearly fall within subsection (b)(1). The agency responds that it firmly believes in the principles in the Executive Order and is committed to bargain over subsection (b)(1) matters as mandated by the Executive Order, BUT, the particular matter or proposal presented also is within subsection (a) and thus the



certainty created by *ACT*, the General Counsel asked the FLRA to decide the following policy issue:

Are matters and proposals which are within the bargaining subjects set forth in section 7106(b)(1) of the Statute negotiable at the election of the agency management at the level of exclusive recognition even though those matters and proposals also may be within the subjects set forth in section 7106(a) of the Statute?<sup>165</sup>

The FLRA subsequently issued a questionnaire in the *Federal Register* to members of the federal labor relations community seeking their opinions on the need for a policy ruling and how the uncertainty between § 7106(a) and (b)(1) should be resolved.<sup>166</sup> The FLRA General Counsel joined almost two dozen respondents consisting of unions, agencies, and individuals in answering the FLRA's request.<sup>167</sup> The FLRA ended the speculation about whether it would adopt the *ACT* decision in October 1995 with its decision in *National Association of Government Employees Local R5-184*.<sup>168</sup> The FLRA adopted the *ACT* court's rationale in ruling § 7106(b)(1) "was indisputably an exception to § 7106(a)."<sup>169</sup> The FLRA also explained how it would subsequently treat union claims concerning § 7106(b)(1) subjects of bargaining. First, the FLRA will determine whether

the proposal concerns matters within the subjects set forth in section 7106(b)(1). If it does, we will not address contentions that those matters also affect the exercise of management's authorities under section 7106(a). Conversely, if we conclude that a proposal does not concern matters within the subjects set forth in section 7106(b)(1), we will then proceed to analyze it under the appropriate subsection of section 7106(a).<sup>170</sup>

However, the FLRA continued to recognize that an agency still has total discretion whether to *initially* negotiate the subject. Relying

agency is prohibited from negotiations. The union then accuses the agency of avoiding, or renegeing on, partnership and the agency responds that it is the union which is not engaging in partnership principles.

FLRA REFERRAL, *supra* note 93, at 7.

165. FLRA REFERRAL, *supra* note 93, at 1.

166. See Notice Relating to the Issuance of a Policy Statement, 60 Fed. Reg. 14,285-86 (1995).

167. See Michael Arian, *Comments on FLRA Request Include Options from General Counsel on Resolving Negotiability Issues Posed by Section 7106 Provisions*, 33 Gov't Empl. Rel. Rep. (Warren, Gorham & Lamont) 684, 684 (May 15, 1995).

168. 51 F.L.R.A. 386 (1995). The FLRA decided to use a factual case rather than a general policy ruling as a vehicle for explaining its future treatment of § 7106(a) and (b)(1). See Order Denying Request for a General Ruling, 51 F.L.R.A. 409, 412 (1995).

169. *National Ass'n Gov't Employees, Local R5-184*, 51 F.L.R.A. at 392 (quoting *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994)).

170. *Id.* at 393 (footnote omitted).

on its own regulations,<sup>171</sup> the FLRA did not reach the issue of whether the agency had already "chosen" to bargain the § 7106(b)(1) subject due to Executive Order 12871.<sup>172</sup>

However, the case utilized by the FLRA to showcase its new test was not particularly controversial and did not reveal how the FLRA would treat future cases involving factually ambiguous issues. The FLRA decided that several union proposals properly comprised subjects of bargaining within § 7106(b)(1).<sup>173</sup> These union proposals dealt with (1) the move of one full-time employee to an organizational subdivision and (2) the change of one part-time employee's tour of duty.<sup>174</sup> However, the two proposals were limited in nature, and the FLRA found no ambiguity over whether the proposals could properly be classified as § 7106(b)(1) subjects of bargaining.<sup>175</sup> As developed in the next Section, unions could propose more ambiguous § 7106(b)(1) bargaining subjects<sup>176</sup> that infringe on management's re-

171. The regulations provide that "[i]f the Authority finds that the duty to bargain extends to the matter . . . only at the election of the agency, the Authority shall . . . issue an order dismissing the petition for review of the negotiability issue." 5 C.F.R. § 2424.10(b) (1996).

172. See *National Ass'n Gov't Employees, Local R5-184*, 51 F.L.R.A. at 394. In effect, the FLRA decided not to recognize Executive Order 12871. It will dismiss a negotiability appeal once it finds a union proposal concerns a § 7106(b)(1) subject.

However, this approach has not avoided the possibility of an agency being forced to negotiate a § 7106(a) reserved right because of Executive Order 12871. The General Counsel has indicated that it will treat Executive Order 12871 as an agency's election, by the President, to negotiate over § 7106(b)(1) subjects. See FLRA *ADVICE*, *supra* note \*, at 7. As such, an agency official at the local level cannot refuse to negotiate a § 7106(b)(1) subject where a higher agency official has already decided to negotiate the issue. See *id.* The General Counsel indicated that if an investigation revealed an agency refused to negotiate over a union proposal *solely* within § 7106(b)(1) (and not also within § 7106(a)), the Office of General Counsel would issue a complaint against the agency. See *id.* at 4. The General Counsel has been unsuccessful in convincing FLRA administrative law judges with this argument. In a 1996 decision, an administrative law judge rejected the General Counsel's reasoning in favor of the disclaimer found in section 3 of Executive Order 12871, stating the Order does not "create a right to administrative or judicial review." See Department of the Air Force, 647th Air Base Group, FLRA No. BN-CA-41011, at 4-5 (July 1996).

A recent decision by the Federal Service Impasses Panel ("FSIP"), see *infra* note 188, raises another avenue for the forced negotiation of § 7106(a) reserved rights. See *In re Department of Veterans Affairs, Palo Alto Health Care Sys.*, Palo Alto, Cal., No. 96 FSIP 1, 1996 FSIP LEXIS 5 (Mar. 20, 1996). The FSIP exercised jurisdiction because it considered Executive Order 12871 as President Clinton's election on the agency's behalf to negotiate the issue. See *id.* at \*5. The FSIP reasoned that the union proposal was still negotiable because it comprised a § 7106(b)(1) issue—a clear exception to § 7106(a) in light of the FLRA's recent adoption of the *ACT* rationale. See *id.* Therefore, in addition to unfair labor practice charges, agencies could soon encounter more FSIP-brokered decisions that infringe on § 7106(a) reserved rights.

173. See *National Ass'n Gov't Employees, Local R5-184*, 51 F.L.R.A. at 395, 398.

174. See *id.*

175. For example, there was no ambiguity over whether the employee's office was an organizational subdivision; an agency memorandum described the particular department as a subdivision. See *id.* at 395.

176. The FLRA recently had an opportunity to reapply its procedure for resolving disputes over permissible and mandatory subjects in *American Fed'n of Gov't Employees Council of Lo-*

served rights to a greater degree than the two subjects in *National Association of Government Employees Local R5-184*.

#### IV. EVALUATION OF *ACT*

##### A. *Ramifications of ACT on Federal Agencies*

*ACT*, in conjunction with Executive Order 12871, has effectively expanded the number of subjects federal sector unions can bargain. While the *ACT* court simply declared § 7106(b)(1) an exception to § 7106(a),<sup>177</sup> it failed to address how to define a § 7106(b)(1) subject *in relation to* § 7106(a) reserved rights. Without further clarification, the court's words imply that any proposal designated a § 7106(b)(1) subject—regardless of even severe interference with an agency's ability to determine its mission budget and other reserved rights—is negotiable at an agency official's discretion.

Furthermore, Executive Order 12871 forces all agency officials to bargain § 7106(b)(1) subjects.<sup>178</sup> Therefore, a resourceful union representative can now craft a proposal couched in terms of § 7106(b)(1) and, because of *ACT* and Executive Order 12871, effectively force an agency to negotiate subjects like an agency's budget and mission. Two bargaining scenarios follow that highlight extreme examples of this expansion of mandatory bargaining subjects.

The FLRA defined firearms as a means of performing work when determining whether a union proposal dealt with a general condition of employment versus a § 7106(b)(1) permissive subject of bargaining.<sup>179</sup> Prior to Executive Order 12871, a union like the National Treasury Employees Union ("NTEU") could not bargain with the U.S. Customs Service over the type of firearms used by Customs Inspectors at U.S. borders unless Customs chose to do so. Because of Executive Order 12871, Customs now must negotiate with NTEU

*cal's No. 163*, 51 F.L.R.A. No. 123, 1996 WL 379495 (July 3, 1996) (2-1 decision). In a split decision, the majority decided that the union proposal for limiting the length of temporary duty assignments did not involve the number or types of employees assigned to an organizational subdivision. *See id.* at \*1, \*4. They relied on both the plain wording of the proposal and the union's interpretation. *See id.* at \*5. However, as Member Wasserman's dissent shows, the FLRA may go beyond the literal language of a union proposal and find a § 7106(b)(1) permissive subject. *See id.* at \*9 (Wasserman, Member, dissenting) (relying on the record to *assume* the union proposal would force the agency to increase the number of employees on the work project, and therefore concluding the union proposal comprised a § 7106(b)(1) subject).

177. *See Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

178. *See Order 12,871, supra* note 8, at 657, *reprinted in* 5 U.S.C. § 7101, at 1033-34.

179. *See American Fed'n of Gov't Employees, Int'l Council of U.S. Marshals Serv. Locals*, 4 F.L.R.A. 384, 387 (1980).

about the type of firearms used by Customs Inspectors if NTEU so proposes.<sup>180</sup> Because of *ACT*, Customs must also negotiate the type of firearms used by Customs Inspectors regardless of the impact of the union's proposal on the agency's budget.<sup>181</sup> For example, NTEU could propose that each Customs Inspector be equipped with expensive assault rifles instead of handguns for defense. Even if the total cost for replacing all handguns with rifles and training Inspectors on their use would severely handicap Customs' ability to maintain its budget, Customs would have no choice but to negotiate this matter with NTEU in good faith based on *ACT* and existing definitions of means of performing work.

Another example involves management's determination of the "numbers, types, and grades of employees" assigned to a "tour of duty."<sup>182</sup> Before Executive Order 12871, a union like the National Association of Air Traffic Controllers ("NATCA") could not negotiate with the Federal Aviation Administration ("FAA") about the exact number of Air Traffic Control Specialists ("ATCS") to be assigned on a tour of duty at a particular FAA facility unless the FAA chose to do so. Because of Executive Order 12871, the FAA must now negotiate with NATCA about the proper number of ATCSs serving on a tour of duty if NATCA so proposes.<sup>183</sup> Because of *ACT*, the FAA must also negotiate the union proposal despite its effects<sup>184</sup> on the FAA's mission to provide safe and efficient service to the traveling public.<sup>185</sup> For example, NATCA could propose to reduce the number of ATCSs assigned to a tour of duty during the busiest air traffic time at an airport and increase the numbers on a less-congested tour of duty in order to maximize the chances for ATCS overtime pay. Even if NATCA's proposed ATCS level during busy traffic time would effectively shut down the airport to a trickle of daily flights, and there-

180. See Order 12,871, *supra* note 8, at 657, reprinted in 5 U.S.C. § 7101, at 1033-34.

181. Cf. Association of Civilian Technicians, Mont. Air Chapter 29, 22 F.3d at 1155.

182. 5 U.S.C. § 7106(b)(1) (1994).

183. See Order 12,871, *supra* note 8, at 657, reprinted in 5 U.S.C. § 7101, at 1033-34. However, Congress recently directed the FAA to negotiate facets of FAA's new personnel management system with those unions representing FAA personnel. See Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3213, 3237 (1996). As a result, unions representing FAA employees now are among the very few federal sector unions that have the right to negotiate previously prohibited issues such as compensation, benefits, and job classification. See *NATCA Becomes First Federal Union to Gain Full Negotiability Rights*, 34 Gov't Empl. Rel. Rep. (Warren, Gorham & Lamont) No. 1685, at 1445 (Oct. 14, 1996).

184. Cf. Association of Civilian Technicians, Mont. Air Chapter 29, 22 F.3d at 1155.

185. "[T]he [FAA] Administrator shall consider . . . controlling the use of the navigable airspace and regulating civil and military operations . . . in the interest of the safety and efficiency of both of those operations." 49 U.S.C. § 40101(d)(3) (1994), amended by Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 401, 110 Stat. 3213, 3255 (1996).

fore force the FAA to expend more overtime funds to maintain traffic levels, the FAA would have no choice but to negotiate the proposal with NATCA according to *ACT* and existing definitions of numbers of employees assigned to a tour of duty.

An agency confronted with such extreme union proposals<sup>186</sup> does not have to agree automatically to the union's demands. However, the agency would have an obligation to bargain in good faith with the union over the extreme proposal.<sup>187</sup> Thus, Executive Order 12871, in conjunction with the *ACT* decision, creates the potential for an agency to engage in inefficient and fruitless negotiations over frivolous union proposals. Regardless of the likelihood for favorable treatment of an extreme union proposal by an arbitrator or the Federal Service Impasses Panel,<sup>188</sup> an agency would have no choice but to negotiate a § 7106(b)(1) proposal that concurrently comprised a § 7106(a) right. In the event an agency ultimately agreed to an extreme union proposal couched in § 7106(b)(1) terms, the agency may have negotiated away a § 7106(a) reserved right. It is unlikely that Congress intended to grant federal agencies the discretion to negotiate their reserved rights completely away when it structured § 7106.<sup>189</sup> The above extreme bargaining proposals highlight the ultimate implications of maintaining that § 7106(b)(1) is an exception to § 7106(a) without redefining § 7106(b)(1) subjects.

186. The above two hypotheticals do not address an agency's potential negotiability defense based on an inconsistency with a federal law or regulation. See *supra* text accompanying notes 29-30. For example, an agency could hypothetically claim undue interference with an annual congressional appropriations bill if a union proposal falling under § 7106(b)(1) would actually call for exceeding the agency's budget. Similarly, an agency potentially could claim interference with an agency's stated mission in the preamble of a statute.

187. An agency commits an unfair labor practice if it fails to "consult or negotiate in good faith with a labor organization." 5 U.S.C. § 7116(a)(5) (1994).

188. The Federal Service Impasses Panel ("FSIP") is an entity within the FLRA which has authority to resolve impasses arising from negotiations about conditions of employment between agencies and unions. See 5 U.S.C. § 7119(c)(1). Either the agency or union may request FSIP intervention. See 5 U.S.C. § 7119(b)(1). An impasse is a "point in the negotiation of conditions of employment at which the parties are unable to reach agreement." 5 C.F.R. § 2470.2(e) (1996). The FSIP may utilize a wide range of techniques for resolving impasses such as ordering binding arbitration and issuing final binding orders and decisions. See 5 C.F.R. § 2471.11(a). The FSIP would have jurisdiction over any true negotiation impasse between an agency and union, including an impasse over a § 7106(b)(1) permissive subject of bargaining. Cf. *supra* note 172.

189. Cf. H.R. REP. NO. 95-1717, at 154 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2888 (explaining that an agency must not negotiate "general policy questions determining how an agency does its work").

*B. ACT's Inconsistency With the Plain Language of the FSLMRS and Rules of Statutory Construction*

The *ACT* court declared § 7106(b) an exception to the general nonnegotiability of § 7106(a) reserved rights.<sup>190</sup> However, this view does not correspond with the plain language of the FSLMRS. In addition, the *ACT* court's declaration of § 7106(b)(1) priority without a further redefinition of § 7106(b)(1) subjects violates an accepted approach to statutory construction.

As an exception,<sup>191</sup> the *ACT* court acknowledged that a union proposal could constitute both a § 7106(b)(1) and (a) subject.<sup>192</sup> Thus, the court blurred the distinction between prohibited and permissive subjects of bargaining. The plain language of § 7106 does not indicate § 7106(b) is an exception to § 7106(a) as the court in *ACT* held. The use of the words "subject to"<sup>193</sup> instead of "except" implies Congress did not intend § 7106(b)(1) subjects to otherwise be included in the § 7106(a) category of reserved rights. If Congress intended § 7106(b) subjects simultaneously to incorporate § 7106(a) reserved rights, it explicitly could have used the word "except" as it did in numerous sections of the FSLMRS.<sup>194</sup>

Adopting the dicta of Judge Scalia,<sup>195</sup> the prefatory clauses to § 7106(a) and (b) act as clarifying language to emphasize the distinct character of mandatory, permissive, and prohibited subjects of bargaining. Therefore, a union proposal should be classified as either falling within § 7106(a) or (b), but not both. By adopting this mutual exclusivity view combined with narrow definitions of § 7106(b)(1) subjects, the FLRA would avoid the possibility of a union proposal

190. See *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

191. "An 'exception' operates to take something out of a thing granted which would otherwise pass or be included." *BLACK'S LAW DICTIONARY* 559 (6th ed. 1990).

192. Cf. *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155.

193. 5 U.S.C. § 7106(a) (1994). The accepted meanings of "subject to" include "governed or affected by" and "provided that." *BLACK'S LAW DICTIONARY* 1425 (6th ed. 1990). The meaning of "provided that" corresponds to Representative Ford's view that § 7106(a) management rights were "conditioned" on the negotiations of § 7106(b) procedures and appropriate arrangements. Cf. 124 CONG. REC. 38,715 (1978).

194. See, e.g., 5 U.S.C. § 7112(b)(1) (1994) (referring to exceptions to the inappropriateness of a bargaining unit that includes supervisors); 5 U.S.C. § 7121(a)(1) (referring to exceptions to the restriction that any grievance procedures outlined in a collective bargaining agreement shall be the exclusive procedures for resolving grievances); 5 U.S.C. § 7131(d) (referring to exceptions to an agency's granting of official time to employees representing unions).

195. See *American Fed'n Gov't Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983).

couched in terms of § 7106(b)(1) excessively interfering with an agency's ability to exercise its reserved rights.

Maintaining mutual exclusivity between § 7106(a) reserved rights and § 7106(b)(1) subjects of bargaining is important in order to avoid a situation like *ACT* where a court must decide subsection priority.<sup>196</sup> To hold that a union proposal can deal with both a § 7106(b)(1) subject and a § 7106(a) right forces a reviewing body to create a hierarchy to determine negotiability. However, Congress created two separate and distinct categories: broad reserved management rights<sup>197</sup> and narrower, specifically worded subjects of bargaining.<sup>198</sup>

*ACT*'s expansion of negotiable subjects also violates an accepted approach to statutory construction.<sup>199</sup> Designating § 7106(b)(1) as an exception without additionally narrowly defining § 7106(b)(1) subjects raises the possibility of an agency bargaining away its budget, mission, organization, and other reserved rights<sup>200</sup> to a union. However, "all words in a statute are to be assigned meaning, and . . . nothing therein is to be construed as surplusage."<sup>201</sup> The *ACT* court in effect made § 7106(a) superfluous. The court's determination that: (1) a § 7106(b)(1) subject can simultaneously embody a reserved management right<sup>202</sup> and (2) a § 7106(b)(1) subject is always a negotiable exception to a reserved right<sup>203</sup> begs the question of why Congress bothered to construct two separate subsections differentiating between prohibited and permissive subjects of bargaining.<sup>204</sup> By not articulating any restraints on § 7106(b)(1) subjects, the *ACT* court tacitly acknowledged that an agency at its discretion can negotiate its budget, mission, organization, and numbers of employees<sup>205</sup> just as long as it couches the proposals in terms of § 7106(b)(1). The court abolished any need for § 7106(a). If an agency can always negotiate a

196. Cf. *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155.

197. Cf. 5 U.S.C. § 7106(a).

198. Cf. 5 U.S.C. § 7106(b).

199. See generally letter from Thomas F. Garnett, Jr., Director, Workforce Relations, Office of the Assistant Secretary of Defense, U.S. Department of Defense, to Phyllis N. Segal, Chair, FLRA 3-4 (Apr. 17, 1995) (on file with the FLRA); letter from William C. Owen, Assistant Director of Personnel for Labor Management Relations, U.S. Department of Justice, to FLRA 5-9 (Apr. 17, 1995) (on file with the FLRA).

200. See 5 U.S.C. § 7106(a)(1).

201. *Lin Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); see also *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (describing a duty to give effect to all words rather than emasculating an entire section of a statute).

202. Cf. *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

203. See *id.*

204. See letter from William C. Owen, *supra* note 199, at 8.

205. See 5 U.S.C. § 7106(a)(1).

reserved right away by couching the negotiations in terms of § 7106(b)(1), there is no reason for Congress to have separated § 7106 into two subsections. If Congress truly intended to allow an agency to negotiate its reserved rights with a union, Congress could have simply prefaced § 7106(a) with the clause "at the election of the agency."<sup>206</sup>

Ironically, the *ACT* court used this very rule of statutory construction to show why § 7106(b)(1) should be an exception to § 7106(a).<sup>207</sup> The court pointed out that the FLRA's interpretation would make § 7106(b)(1) superfluous.<sup>208</sup> If an agency is permitted to negotiate § 7106(b)(1) subjects but simultaneously is prohibited from bargaining them because of § 7106(a), § 7106(b)(1) is rendered "nugatory."<sup>209</sup> However, at the same time, the court failed to recognize the exact opposite holds true for § 7106(b)(1) acting as an exception to § 7106(a). An adoption of the mutual exclusivity interpretation would avoid this apparent circular deadlock. By recognizing that a proposal can only constitute a § 7106(b)(1) subject of bargaining or a § 7106(a) reserved right, a court could then give effect to the wording in both subsections.

### C. *ACT's Inconsistency With the Legislative History of the FSLMRS*

In holding that § 7106(b)(1) is an exception to § 7106(a),<sup>210</sup> the *ACT* court failed to consider whether its interpretation corresponded with congressional intent. First, the ramifications of the court's holding ignored Congress' original intention to ultimately restrict the number of negotiable subjects of bargaining in order to provide an efficient and effective public sector.<sup>211</sup> Second, the court ignored legislative history indicating that Congress intended the rights and subjects in § 7106(a) and (b) to be mutually exclusive.<sup>212</sup>

The preface to the FSLMRS states "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government."<sup>213</sup> This statement, in con-

206. 5 U.S.C. § 7106(b)(1).

207. See *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155 (citing *United States v. Menasche*, 348 U.S. 528 (1955)); see also, letter from William C. Owen, *supra* note 199, at 8.

208. See *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155.

209. *Id.*

210. See *id.*

211. See 5 U.S.C. § 7101(a)(1)(B).

212. See discussion *supra* pp. 845-48.

213. 5 U.S.C. § 7101(b).



junction with the selection from the Joint Conference Report describing limitations on negotiations on methods and means of performing work,<sup>214</sup> indicates Congress did not intend federal sector unions to share in broad policy decisions with agencies on matters such as an agency's mission and budget.

However, as shown by the above bargaining scenarios,<sup>215</sup> a union can now propose a § 7106(b)(1) subject for negotiation that effectively would allow a union to share decision-making power in determining general policy questions with an agency. Considering congressional scrutiny of the FSLMRS during its passage and the fears regarding too much expansion of federal sector union power,<sup>216</sup> it is unlikely Congress would have voted for a bill that broadened subjects of bargaining to such an extent.

The *ACT* court also did not acknowledge the legislative history indicating § 7106(b) subjects were intended to be separate and limited in scope from § 7106(a) reserved rights. Representative Ford's hypothetical concerning the transfer of employees<sup>217</sup> indicates management retains § 7106(a) rights on the condition that it first negotiates procedures and appropriate arrangements with a union. This suggests Congress did not conceptualize broad reserved rights as being equivalent to specific § 7106(b) procedures and arrangements. The statement in the Conference Committee Report describing certain nonnegotiable matters and *other* matters negotiable at an agency's discretion<sup>218</sup> reinforces the view that § 7106(a) and (b)(1) are mutually exclusive. Finally, the selection from the Conference Committee Report describing limitations on the scope of methods and means of performing work<sup>219</sup> reinforces the view that § 7106(b)(1) subjects are a narrowly defined category separate from § 7106(a) reserved rights.

The *ACT* court also failed to acknowledge that its own precedent does not treat § 7106(b) as an absolute exception to § 7106(a). In commenting on both § 7106(b)(2) and (3), the court has held that

214. See H.R. REP. NO. 95-1717, at 153-54 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2887-88.

215. See *supra* Part IV.A.

216. See, e.g., H.R. REP. NO. 95-1403, at 404 (1978), reprinted in LEGISLATIVE HISTORY, *supra* note 16, at 675, 730 (outlining Republican view that granting more bargaining power to federal unions as "a dangerous step"); 124 CONG. REC. 21,884 (1978) (Representative Derwinski commenting that H.R. 11,280 had expanded "the labor-management title . . . to benefit labor unions at the expense of sound managerial flexibility.").

217. 124 CONG. REC. 38,715 (1978).

218. H.R. REP. NO. 95-1717, at 153, reprinted in 1978 U.S.C.C.A.N. 2860, 2887.

219. H.R. REP. NO. 95-1717, at 154, reprinted in 1978 U.S.C.C.A.N. 2860, 2888.

there always are negotiability limits to a union proposal dealing with either a procedure or an appropriate arrangement.

The ACT court first cited *American Federation of Government Employees, Local 1923 v. FLRA*,<sup>220</sup> ("AFGE") as support for holding all of § 7106(b) is an exception to § 7106(a), notwithstanding an effect on § 7106(a) management rights.<sup>221</sup> However, while the court in *AFGE* initially stated § 7106(b)(2) and (3) were mandatory subjects of bargaining regardless of an effect on management rights, it proceeded to describe in the next paragraph the accepted tests used to differentiate a procedure and appropriate arrangement from a management right.<sup>222</sup> These tests incorporate criteria to insure the union proposal does not directly or excessively interfere with a management reserved right. Thus, *AFGE* does not stand for the proposition that any union proposal with the trappings of a procedure or arrangement automatically trumps a § 7106(a) reserved right. Rather, *AFGE* acknowledges that appropriate arrangements and procedures are limited in scope in relation to reserved rights and need to be defined narrowly. Only after the union proposal has been properly classified as a procedure or appropriate arrangement can the statement be made that an agency has a duty to bargain with § 7106(b) subjects, "notwithstanding that implementation . . . would affect the enumerated managerial rights."<sup>223</sup>

Therefore, the ACT court misused *AFGE* in trying to show § 7106(b)(1) was an exception to § 7106(a). Rather than supporting the ACT court's holding that § 7106(b)(1) is an exception, *AFGE* implies § 7106(b)(1) should be treated as a narrow, mutually exclusive category of bargaining subjects just like procedures and appropriate arrangements. As such, clearly defined tests should be developed to classify when a proposal truly concerns § 7106(b)(1) subjects or when it effectively comprises negotiations over § 7106(a) reserved rights. Only after such a test is applied should the statement of subsection priority be made.

The ACT court next referenced *American Federation of Government Employees, Local 2782 v. FLRA*,<sup>224</sup> ("*AFGE II*") as support for the view that all of § 7106(b) was an exception to § 7106(a).<sup>225</sup> How-

220. 819 F.2d 306 (D.C. Cir. 1987).

221. See *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

222. See *American Fed'n Gov't Employees, Local 1923*, 819 F.2d at 308.

223. *Id.*

224. 702 F.2d 1183 (D.C. Cir. 1983).

225. See *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155.

ever, the court failed to acknowledge that Judge Scalia declared only § 7106(b)(3) an exception to § 7106(a), while maintaining the mutual exclusivity of § 7106(b)(2) procedures.<sup>226</sup> Judge Scalia recognized that § 7106(b)(2) procedures were by their very nature mutually exclusive from § 7106(a) substantive reserved rights.<sup>227</sup> Furthermore, the *ACT* court failed to acknowledge that Judge Scalia held a proper arrangement could still be inappropriate if it excessively interfered with a reserved right.<sup>228</sup>

Therefore, the *ACT* court misused its own precedent to declare that § 7106(b)(1) was an exception to § 7106(a). *AFGE II* explains how § 7106(b)(2) and (3) are narrowly defined by reference to interference with § 7106(a) reserved rights. By extension, § 7106(b)(1) should be treated in the same way. The numbers, types, and grades of employees assigned to an organizational subdivision and the methods and means of performing work<sup>229</sup> should be narrowly defined to avoid excessive interference with § 7106(a) reserved rights.

While *ACT* suffers from an overly broad declaration that § 7106(b) is an absolute exception to § 7106(a),<sup>230</sup> the court's blanket statement is understandable considering the lack of commentary and treatment by the FLRA and parties during the preceding administrative proceeding. As stated previously, the FLRA and agency conceded the uniform issue was both a § 7106(b)(1) subject as well as an infringement on a § 7106(a) reserved right.<sup>231</sup> In a sense, the FLRA and agency conceded too much. The *ACT* court therefore was faced with a case analogous to a situation where an agency concedes that a union proposal properly deals with a § 7106(b)(3) appropriate arrangement. If, from the outset, an agency agrees that a union proposal satisfies all the various tests for appropriate arrangements, the agency has lost the argument and cannot claim nonnegotiability based on a reserved right.<sup>232</sup> Similarly, the *ACT* court was faced with the FLRA and agency's concession that the uniform issue satisfied the

226. See *American Fed'n Gov't Employees, Local 2782*, 702 F.2d at 1187.

227. Cf. *id.*

228. See *id.* at 1188.

229. See 5 U.S.C. § 7106(b)(1) (1994).

230. The court simply affirmed that § 7106(b) was "indisputably an exception to § 7106(a)." *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1155.

231. See *id.* at 1154.

232. Once a proposal has been properly classified as a § 7106(b)(3) appropriate arrangement, an agency must negotiate it, because appropriate arrangements are mandatory subjects of bargaining in the federal sector. Cf. 5 U.S.C. § 7106(b)(3); discussion of appropriate arrangements *supra* pp. 851-53.

definition of a means of performing work.<sup>233</sup> When one considers: (1) the parties' concession and (2) prior case law holding uniforms are means of performing work,<sup>234</sup> the court's ruling is not surprising.

## V. PROPOSED RELATIONSHIP BETWEEN § 7106(a) AND (b)(1)

Based on legislative history and judicial precedent, the proper relationship between § 7106(a) and (b) should be mutual exclusivity. As such, the FLRA should classify a union proposal as constituting either a management reserved right or a § 7106(b)(1) subject. However, the FLRA must insure that it properly classifies a union proposal as either a § 7106(a) reserved right or a § 7106(b)(1) subject. The various tests developed by the FLRA are calibrated to determine whether a union proposal deals with a general condition of employment or a specific § 7106(b)(1) subject.<sup>235</sup> The FLRA needs to redesign the tests in order to insure the union proposal really does not deal with a § 7106(a) reserved right. For example, the FLRA could adopt an excessive interference test to avoid negotiations on subjects that primarily consist of reserved rights.<sup>236</sup> The FLRA could use this test to determine, for example, whether a proposal concerning the numbers of employees

233. *Association of Civilian Technicians, Mont. Air Chapter 29*, 22 F.3d at 1154.

234. The ACT court outlined several cases from various federal circuits affirming that the wearing of uniforms was a means of performing work within the meaning of § 7106(b)(1). *See id.* However, the definitions devised by the FLRA to define a means of performing work are calibrated to differentiate between a § 7106(b)(1) permissive subject of bargaining and a general condition of employment. Different tests and definitions could help determine whether an issue is truly a § 7106(b)(1) subject or a § 7106(a) reserved right. *See infra* Part V.

235. *Cf. Department Health & Human Serv., Indian Health Serv., Okla. City v. FLRA*, 885 F.2d 911 (D.C. Cir. 1989) (affirming FLRA's decision that a union proposal for separate smoking facilities did not infringe on a § 7106(b)(1) subject but rather was a negotiable condition of employment); *Department Air Force, Scott Air Force Base, Ill.*, 33 F.L.R.A. 532, 542-43 (1988) (changing an employee's tour of duty falls within the scope of permissive subjects under § 7106(b)(1) as opposed to a negotiable condition of employment); *National Treasury Employees Union*, 8 F.L.R.A. 3, 3-4 (1982) (holding that the wearing of uniforms is a means of performing work rather than a negotiable condition of employment).

All of the above cases utilized tests and definitions designed to differentiate between mandatory negotiable conditions of employment and permissive subjects of bargaining. As such, the tests and definitions classified a broad range of union proposals as permissive subjects in the attempt to protect management's prerogative to only bargain at its discretion. After Executive Order 12871, the danger arises of the FLRA utilizing these tests and definitions to test whether a union proposal is either a permissive or prohibited subject. If the FLRA fails to recalibrate these tests, a wide range of subjects will be declared permissive, and Executive Order 12871 will force agencies to bargain them.

236. This approach would maintain consistency with past treatment of § 7106(b) by the United States Court of Appeals for the District of Columbia Circuit. *See, e.g., American Fed'n Gov't Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983) (outlining Judge Scalia's excessive interference test for appropriate arrangements); discussion *supra* Part I.C.

really applies to an organizational subdivision<sup>237</sup> or whether a method and means<sup>238</sup> narrowly applies to the performance of work.

Applying this approach to the uniform issue in *ACT*, the FLRA and court first should have classified the uniform proposal under only one subsection. Furthermore, they should not have restricted themselves to labeling the wearing of uniforms as a means of performing work.<sup>239</sup> Instead, they should have recalibrated the test to differentiate between a means of performing work and a reserved management right. The FLRA and court could have used an excessive interference test to determine whether the failure to wear uniforms would have excessively undermined the agency's ability to maintain security at the military base. If the uniforms served primarily a security function<sup>240</sup> instead of primarily as a tool to conduct manual labor around the military base, the FLRA and court should have declared the proposal a prohibited subject of bargaining.

By adopting a mutual exclusivity framework with redesigned, narrower definitions of § 7106(b)(1) subjects, the FLRA could also reduce the possibility of an agency being forced to bargain over the extreme proposals described in the two bargaining scenarios above.<sup>241</sup> For example, Customs and FAA could avoid negotiating the firearms and tour of duty proposals if the FLRA decided initially to classify the proposals only as § 7106(a) or (b)(1) subjects of bargaining. In addition, bargaining the extreme union proposals would be avoided by new tests for means of performing work and tours of duty that excluded those union proposals that excessively interfere with an agency's budget or mission.

## CONCLUSION

Before 1994, federal agencies enjoyed a broad range of nonnegotiable reserved rights contained in § 7106(a).<sup>242</sup> In 1993, Executive Order 12871 required agencies to negotiate previously permissive subjects of bargaining contained in § 7106(b)(1).<sup>243</sup> The Executive Order was not perceived to change dramatically an agency's ability to refuse

237. See 5 U.S.C. § 7106(b)(1) (1994).

238. See *id.*

239. See *Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1154 (D.C. Cir. 1994).

240. See 5 U.S.C. § 7106(a)(1) (1994).

241. See *supra* Part IV.A.

242. See *supra* Part I.A.

243. Order 12,871, *supra* note 10, at 657, *reprinted in* 5 U.S.C. § 7101, at 1033-34.

to negotiate § 7106(a) management rights.<sup>244</sup> However, *ACT* altered the relationship between § 7106(a) and (b)(1) subjects of bargaining. The *ACT* court declared § 7106(b)(1) subjects exceptions to § 7106(a) reserved rights.<sup>245</sup> *ACT* in conjunction with Executive Order 12871 required an agency to negotiate a § 7106(b)(1) union proposal despite even excessive interference with a § 7106(a) reserved right.<sup>246</sup> The FLRA subsequently adopted the view that § 7106(b)(1) was an exception to § 7106(a).<sup>247</sup>

Both the FLRA and the *ACT* court failed to consider properly the legislative history of the FSLMRS and prior decisions of the United States Court of Appeals for the District of Columbia Circuit. The legislative materials indicate Congress intended § 7106(a) and § 7106(b)(1) to be mutually exclusive.<sup>248</sup> Permissive § 7106(b)(1) subjects were not intended to encompass broad policy issues contained in § 7106(a). Furthermore, the *ACT* court failed to acknowledge its own precedent that recognized negotiability limits on § 7106(b)(2) and (3) subjects.<sup>249</sup> As a result, the FLRA and *ACT* court have provided federal sector unions with an opportunity to negotiate § 7106(a) reserved rights that are couched in terms of § 7106(b)(1) subjects.

Nevertheless, the future relationship between § 7106(a) and (b) is still uncertain despite the FLRA's adoption of the *ACT* rationale. The analytical framework developed by the FLRA<sup>250</sup> can still be utilized to avoid the implications of *ACT* for § 7106(a). To accomplish this, the FLRA needs to recalibrate its definitions of § 7106(b)(1) subjects<sup>251</sup> to incorporate some form of excessive interference theory similar to the one utilized for appropriate arrangements.<sup>252</sup> While federal

244. See *supra* Part II.

245. Association of Civilian Technicians, Mont. Air Chapter 29 v. FLRA, 22 F.3d 1150, 1155 (D.C. Cir. 1994).

246. See *supra* Part III.B.

247. National Ass'n Gov't Employees, Local R5-184, 51 F.L.R.A. 386, 392 (1995).

248. See *supra* Part IV.C.

249. See *supra* Part IV.D.

250. See *National Ass'n Gov't Employees, Local R5-184*, 51 F.L.R.A. at 393.

251. However, in certain circumstances, even current definitions of § 7106(b)(1) subjects will still bar unions from negotiating certain subjects. In a recent application of the FLRA's new § 7106(b)(1) procedure, a majority of the FLRA found that a union proposal, restricting an agency from assigning more than 90 days of temporary duty assignments to employees, did not constitute a § 7106(b)(1) subject. American Fed'n Gov't Employees Council of Locals No. 163, 51 F.L.R.A. No. 123 (July 3, 1996) (2-1 decision), 1996 WL 379495. The FLRA concluded the union proposal did not fit the current definitions of the numbers, types and grades of employees. *Id.* at \*4 to \*5. However, Member Wasserman's dissent illustrates the potential for misusing current definitions to classify union proposals as § 7106(b)(1) subjects of bargaining instead of § 7106(a) reserved rights. *Cf. id.* at \*8 to \*9.

252. See *National Ass'n Gov't Employees, Local R14-87*, 21 F.L.R.A. 24, 31-33 (1986).

sector unions may not have yet gained a clear mandate to join agencies in formerly prohibited budget and mission determinations, future FLRA decisions potentially could catapult these unions into a bargaining position reminiscent of their private sector counterparts.